

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation against:

MICHAEL JOHN MERRILL

P. O. Box 1123

San Ramon, CA 94583

Civil Engineer License No. C 27544

Geotechnical Engineer License No. GE 955,

Respondent.

Case No. 912-A

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board for Professional Engineers, Land Surveyors, and Geologists as its Decision in the above-entitled matter.

This Decision shall become effective on September 2, 2011.

IT IS SO ORDERED July 28, 2011.

Original Signed

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
Department of Consumer Affairs
State of California

1 KAMALA D. HARRIS
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 MICHAEL B. FRANKLIN
Deputy Attorney General
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8 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 912-A

12 **MICHAEL JOHN MERRILL**
P.O. Box 1123
13 San Ramon, CA 94583,

OAH No. 2010090665

14 **Civil Engineer License No. C 27544,**

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

15 **Geotechnical Engineer License No. GE 955**

16 Respondent.

17
18
19 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
20 entitled proceedings that the following matters are true:

21 PARTIES

22 1. Joanne Arnold (Complainant) is the Acting Executive Officer of the Board for
23 Professional Engineers, Land Surveyors, and Geologists. Former Executive Officer David E.
24 Brown brought this action solely in his official capacity. Complainant is represented in this
25 matter by Kamala D. Harris, Attorney General of the State of California, by Michael B. Franklin,
26 Deputy Attorney General.

27 2. Respondent Michael John Merrill (Respondent) is representing himself in this
28 proceeding and has chosen not to exercise his right to be represented by counsel.

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1 the parties, and the Board shall not be disqualified from further action by having considered this
2 matter.

3 14. The parties understand and agree that facsimile copies of this Stipulated Settlement
4 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and
5 effect as the originals.

6 15. This Stipulated Settlement and Disciplinary Order is intended by the parties to be an
7 integrated writing representing the complete, final, and exclusive embodiment of their agreement.
8 It supersedes any and all prior or contemporaneous agreements, understandings, discussions,
9 negotiations, and commitments (written or oral). This Stipulated Settlement and Disciplinary
10 Order may not be altered, amended, modified, supplemented, or otherwise changed except by a
11 writing executed by an authorized representative of each of the parties.

12 16. In consideration of the foregoing admissions and stipulations, the parties agree that
13 the Board may, without further notice or formal proceeding, issue and enter the following
14 Disciplinary Order:

15 **DISCIPLINARY ORDER**

16 IT IS HEREBY ORDERED that Civil Engineer License No. C 27544 and Geotechnical
17 Engineer License No. GE 955 issued to Respondent Michael John Merrill (Respondent) are
18 revoked. However, the revocations are stayed and Respondent is placed on probation for three
19 (3) years on the following terms and conditions.

20 1. **Obey All Laws.** The Respondent shall obey all laws and regulations related to the
21 practices of professional engineering and professional land surveying.

22 2. **Submit Reports.** The Respondent shall submit such special reports as the Board may
23 require.

24 3. **Tolling of Probation.** The period of probation shall be tolled during the time the
25 Respondent is practicing exclusively outside the state of California. If, during the period of
26 probation, the Respondent practices exclusively outside the state of California, the Respondent
27 shall immediately notify the Board in writing.

28 4. **Violation of Probation.** If the Respondent violates the probationary conditions in

1 any respect, the Board, after giving the Respondent notice and the opportunity to be heard, may
2 vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of
3 probation, an accusation or petition to vacate stay is filed against the Respondent, or if the matter
4 has been submitted to the Office of the Attorney General for the filing of such, the Board shall
5 have continuing jurisdiction until all matters are final, and the period of probation shall be
6 extended until all matters are final.

7 **5. Completion of Probation.** Upon successful completion of all of the probationary
8 conditions and the expiration of the period of probation, the Respondent's licenses shall be
9 unconditionally restored.

10 **6. Cost Recovery.** Within two and one-half (2 ½) years of the effective date of the
11 decision, Respondent shall reimburse the Board for its investigative and enforcement costs in this
12 matter in the amount of \$2,500.00. Said reimbursement may be paid in installments.

13 **7. Examination.** Within 90 days of the effective date of the decision, the Respondent
14 shall successfully complete and pass the California Laws and Board Rules examination, as
15 administered by the Board.

16 **8. Ethics Course.** Within two and one-half (2 ½) years of the effective date of the
17 decision, Respondent must successfully complete and pass a course in professional ethics,
18 approved in advance by the Board or its designee.

19 **9. Notification.** Within thirty (30) days of the effective date of the decision,
20 Respondent shall provide the Board with evidence that he has provided all persons or entities with
21 whom he has a contractual or employment relationship relating to professional civil engineering
22 services with a copy of the decision and order of the Board and shall provide the Board with the
23 name and business address of each person or entity required to be so notified. During the period
24 of probation, Respondent may be required to provide the same notification to each new person or
25 entity with whom he has a contractual or employment relationship relating to professional civil
26 engineering services and shall report to the Board the name and address of each person or entity
27 so notified.

28 ///

10. **Take And Pass Examinations.** Within two and one-half (2 ½) years of the effective date of the decision, Respondent shall successfully complete and pass a college-level course specifically related to the field of geotechnical/soils engineering. Said course shall be approved in advance by the Board or its designee. Respondent shall provide the Board with official proof of completion of the requisite course. For purposes of this condition, “college-level course” means a course offered by a community college or a four-year university of three semester units or the equivalent; it does not include seminars.

ACCEPTANCE

I have carefully read the Stipulated Settlement and Disciplinary Order. I understand the stipulation and the effect it will have on my Civil Engineer License and Geotechnical Engineer License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board for Professional Engineers, Land Surveyors, and Geologists.

DATED:

MICHAEL JOHN MERRILL
Respondent

decision, Respondent shall successfully complete and pass a college-level course specifically related to the field of geotechnical/soils engineering. Said course shall be approved in advance by the Board or its designee. Respondent shall provide the Board with official proof of completion of the requisite course. For purposes of this condition, "college-level course" means a course offered by a community college or a four-year university of three semester units or the equivalent; it does not include seminars.

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I have carefully read the Stipulated Settlement and Disciplinary Order. I understand the stipulation and the effect it will have on my Civil Engineer License and Geotechnical Engineer License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board for Professional Engineers, Land Surveyors, and Geologists.

DATED:

May 19, 2011

Original Signed

MICHAEL JOHN MERRILL

Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board for Professional Engineers, Land Surveyors, and Geologists of the Department of Consumer Affairs.

Dated: _____

Respectfully submitted,

Kamala D. Harris

Attorney General of California

Frank H. Pacoe

Supervising Deputy Attorney General

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board for Professional Engineers, Land Surveyors, and Geologists of the Department of Consumer Affairs.

Dated: May 20, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
FRANK H. PACOE
Supervising Deputy Attorney General

Original Signed

MICHAEL B. FRANKLIN
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 912-A

1 EDMUND G. BROWN JR.
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
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BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
9 **DEPARTMENT OF CONSUMER AFFAIRS**
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10 In the Matter of the Accusation Against:

Case No. 912-A

11 **MICHAEL JOHN MERRILL**
12 **P.O. Box 1123**
San Ramon, CA 94583
13 **Civil Engineer License No. C 27544**
14 **Geotechnical Engineer License No. GE 955**

A C C U S A T I O N

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. David E. Brown (Complainant) brings this Accusation solely in his official capacity
20 as the Executive Officer of the Board for Professional Engineers and Land Surveyors,
21 Department of Consumer Affairs.

22 2. On or about March 9, 1977, the Board for Professional Engineers and Land Surveyors
23 issued Civil Engineer License Number C 27544 to Michael John Merrill (Respondent). The Civil
24 Engineer License expired on September 30, 2009, and has not been renewed.

25 3. On or about December 20, 1987, the Board for Professional Engineers and Land
26 Surveyors issued Geotechnical Engineer License Number GE 955 to Michael John Merrill
27 (Respondent). The Geotechnical Engineer License expired on September 30, 2009, and has not
28 been renewed.

JURISDICTION

4. This Accusation is brought before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

5. Section 6775 of the Code states, in pertinent part, that "[T]he board may reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer registered under this chapter:

...

(c) Who has been found guilty by the board of negligence or incompetence in his or her practice.

...

"(h) Who violates any provision of this chapter."

6. Section 6749 of the Code states:

"(a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:

- (1) A description of the services to be provided to the client by the professional engineer.
- (2) A description of any basis of compensation applicable to the contract, and the method of payment agreed upon by the parties.
- (3) The name, address, and license or certificate number of the professional engineer, and the name and address of the client.
- (4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.
- (5) A description of the procedure to be used by any party to terminate the contract.

• • •

7. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

MAGNUS PROJECT

8. Beginning in 2003, Respondent performed various engineering work for Gene Magnus related to a retaining wall located at 20465 Alameda Street, Castro Valley, California (hereinafter “Magnus project.”). Specific work performed included:

a. Engineering Consultation Report, dated August 27, 2002. This report contained observations of an existing segmental (Keystone brand) retaining wall of shape, height, block type and levelness, backfill material, geogrid layers, lean, gaps and drainage. Respondent concluded that the retaining wall was not constructed in accordance with the manufacturer's information and standard construction practice and that the retaining wall should be dismantled and reconstructed. Respondent did not recommend, in this report, to have exploration, laboratory testing, engineering analyses, engineering recommendations, and/or design performed for the new retaining wall.

b. Design of Keystone Retaining Walls, dated September 4, 2003. This design utilized a Keystone Retaining Wall System computer program ("Keywall") that required the input of soil parameters. However, the design was not based on exploration and soil sampling, field strength information or laboratory testing.

c. Engineering Observations Report, dated January 27, 2004. This report contains observations made by Respondent during the dismantling and reconstruction of the retaining wall. The stated purpose of this report was to confirm the soils present at the project site were as anticipated and to assess whether the retaining wall was reconstructed in accordance with the approved design. Respondent concluded that the soils encountered and used for the wall were as anticipated in the design of the wall and that the wall had been constructed in accordance with the design calculations and recommendations.

1 **FIRST CAUSE FOR DISCIPLINE**

2 (Negligence)

3 9. Respondent is subject to disciplinary action under section 6775(c) in that Respondent
4 did not use the care ordinarily exercised in like cases by duly licensed professional engineers in
5 good standing as follows:

6 a. Respondent failed to perform subsurface exploration and laboratory testing to
7 substantiate his design of the retaining wall for the Magnus project as described in paragraph 8
8 above. There were no soil samples obtained and no laboratory testing to determine soil strength,
9 settlement potential, expansion potential and ground water conditions.

10 b. Respondent failed to include seismic analysis in his design for the retaining wall.
11 Respondent should have considered an appropriate seismic value for the Keywall program or
12 determined if supplemental seismic analyses were necessary.

13 c. Respondent failed to perform a complete geotechnical analysis. Respondent did not
14 provide calculations, analysis or rationale for bearing capacity, settlement, or expansion potential
15 on the Magnus project.

16 d. Respondent failed to perform global slope stability analyses in the design of the
17 retaining wall.

18 e. Respondent failed to provide a written agreement between himself and Mr. Magnus
19 for any of the work performed on the Magnus project.

20 **SECOND CAUSE FOR DISCIPLINE**

21 (Unprofessional Conduct)

22 10. Respondent is subject to disciplinary action under section 6775(h), in that Respondent
23 failed to comply with section 6749(a) by failing to provide a written contract for any of the work
24 performed on the Magnus project.

25 **GIANNECCHINI PROJECT**

26 11. On or about January 2006, Respondent and Alberto Gianneccchini entered into a
27 contract whereby Respondent agreed to review the project site, review plans for the proposed
28 retaining walls and to provide an engineering design and calculations for proposed retaining walls

1 located at 5721 and 5717 Thousand Oaks Drive, Castro Valley, California (hereinafter
2 “Giannecchini project.”).

3 On or about January 31, 2006, Respondent prepared a retaining wall design for segmental
4 block wall systems. The design was accomplished using Keywall software (version 3.2.2.278)
5 considering wall heights between 4 and 14 feet and two types of Strata brand geogrid.
6 Respondent used a peak ground acceleration (“PGA”) of 0.20g for seismic conditions.

7 **THIRD CAUSE FOR DISCIPLINE**

8 (Negligence)

9 12. Respondent is subject to disciplinary action under section 6775(c) in that Respondent
10 did not use the care ordinarily exercised in like cases by duly licensed professional engineers in
11 good standing as follows:

12 a. Respondent utilized a PGA of 0.20g in the seismic design portion of the Keywall
13 program. However the PGA for this particular site would be 0.67g, a value significantly higher
14 than the 0.20g used by Respondent in his design. As the Keywall program modified the PGA
15 automatically, Respondent should not have reduced the PGA himself prior to utilizing the
16 Keywall program.

17 b. The Keywall program has a normal upper limit of 0.44g on acceleration values.
18 Respondent should have understood that the particular site conditions for the Giannecchini
19 project [0.67g] exceeded the limitations of the pseudo-static-based program and should have
20 performed or considered performing a supplemental seismic displacement analysis or a dynamic
21 finite-element/finite-difference analysis.

22 **FOURTH CAUSE FOR DISCIPLINE**

23 (Unprofessional Conduct)

24 13. Respondent is subject to disciplinary action under section 6775(h), in that Respondent
25 failed to comply with sections 6749(a)(3), (4) and (5) in his contract with Alberto Giannecchini,
26 as follows:

27 a. Respondent failed to include his license number on the written contract.
28

1 b. Respondent failed to include in the written contract a description of the procedure to
2 be used to accommodate additional services, in violation of 6749(a)(4).

3 c. Respondent's written contract failed to describe the procedure to be used by the
4 parties to terminate the contract, in violation of 6749(a)(5).

5 **PRAYER**

6 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
7 and that following the hearing, the Board for Professional Engineers and Land Surveyors issue a
8 decision:

9 1. Revoking or suspending Civil Engineer License Number C 27544, issued to Michael
10 John Merrill;

11 2. Revoking or suspending Geotechnical Engineer License Number GE 955, issued to
12 Michael John Merrill;

13 3. Ordering Michael John Merrill to pay the Board for Professional Engineers and Land
14 Surveyors the reasonable costs of the investigation and enforcement of this case, pursuant to
15 Business and Professions Code section 125.3;

16 4. Taking such other and further action as deemed necessary and proper.
17
18

19 DATED: 6/25/00

Original Signed

20 DAVID E. BROWN

21 Executive Officer

22 Board for Professional Engineers and Land Surveyors

23 Department of Consumer Affairs

24 State of California

25 Complainant

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